Supreme Court, U.S.
FILED
041176 DEC 29 2004
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

SHAWN R. WASHBURN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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APPENDIX A

MEMORANDUM AND ORDER

OF THE UNITED STATES DISTRICT

COURT FOR THE NORTHERN DISTRICT

OF INDIANA, SOUTH BEND DIVISION,

ROBERT L. MILLER, JR., JUDGE

ENTERED ON MAY 20, 2003

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA

vs. CAUSE NUMBER 3:03CR0017RM
SHAWN R. WASHBURN

MEMORANDUM AND ORDER

On the morning of November 6, 2002, Jesse Tijerina (who was cooperating with Defiance, Ohio police authorities) went to Thomas Wright's Elkhart, Indiana home and approved delivery of ten pounds of methamphetamine. The approval led to a small caravan of vehicles from Elkhart, bound for Defiance. Police from Defiance and Elkhart followed the caravan and stopped the vehicles in Ney, Ohio pursuant to an anticipatory search warrant, seized ten one-pound vacuum-sealed packages of what field tests indicated was methamphetamine, and took the people in the procession into custody.

Thomas Wright and David Morgan were among those taken into custody. Both named Shawn Washburn as the source of the methamphetamine. Mr. Morgan admitted his role in the transaction with Mr. Tejerina and offered to assist authorities. He told the authorities that when he obtained the seized ten pounds of methamphetamine from Mr. Washburn's vehicle, he took it from a black bag on the console that contained sixteen other one-pound packages methamphetamine. Mr. Morgan said Mr. Washburn lived on County Road 6. The police asked Mr. Morgan to set up another deal with Mr. Washburn, and Mr. Morgan agreed.

Mr. Morgan's first monitored call to Mr. Washburn made reference to the morning's Ohio-bound shipment and discussed a purchase by the Ohio buyers of another ten to twelve pounds of methamphetamine. Mr. Washburn agreed to

meet Mr. Morgan in Elkhart at 7:00 p.m. for that purpose. The conversation was not specific, but officers understood the exchange was to occur at the Hacienda restaurant in Elkhart. The Defiance officers notified Elkhart Police Lieutenant Barry Snyder, who arranged for surveillance to be set up at the Hacienda.

A second monitored phone call was placed about an hour and a half later. In that call, Mr. Washburn directed Mr. Morgan to meet at the Weston Plaza hotel at 7:00 p.m.. Unbeknownst to Mr. Washburn, Mr. Morgan still was in Ohio in the company of the Defiance officers, who notified Lt. Snyder of the call. The surveillance officer hurriedly moved to the Weston Plaza hotel.

Mr. Morgan had told Defiance police that Mr. Washburn would be driving a white Chevy conversion van with graphics on the outside and a woodgrain interior. Close to 7:00 p.m., the surveillance officers saw a van matching that description enter the Weston Plaza parking lot, circle the building completely, and park in a space between two hotel entrances. A white male got out of the van, walked into one of the hotel entrances and turned around, as if looking out. When the man left the building and started in the direction of the van, Lt. Snyder ordered the officers to move in.

By the time Lt. Snyder arrived, the officers had prevented Mr. Washburn from entering the van. Some of the officers had displayed their weapons, and Mr. Washburn had been ordered to the ground. The officers had ascertained that the man was Shawn Washburn. Lt. Snyder told Mr. Washburn who he was and why he was there. He told Mr. Washburn that he believed controlled substances were in a bag in the van; from Lt. Snyder's vantage point, he could see both the bag and the woodgrain interior in the van. When Lt. Snyder asked for permission to search the van, Mr. Washburn politely declined. Lt. Snyder then told Mr. Washburn that he believed he had enough probable cause to get warrant, and asked Mr. Washburn to wait with officers in police car. Mr. Washburn

agreed.

One of the surveillance officers ran a check on the license plates and learned the, van was registered to JoAnn and Shawn Washburn. A police dog trained to sniff for methamphetamine and other controlled substances was brought to the scene. The parties dispute how long it took the dog and its handler to arrive. The dog alerted by sitting and pointing at the seams of the van where the passenger double doors and the front passenger door opens. Officers on the scene decided to talk to a prosecutor, who said a warrant should be obtained to search the van.

Elkhart Superior Court Judge Steven Platt signed a search warrant at about 8:45 p.m. Mr. Washburn contends that the warrant was defective because the information on which it was based wasn't given under oath; that issue's resolution was deferred until the' court resolved the remaining issues posed by the suppression motion. The warrant was brought to the scene. Lt. Snyder examined the warrant, recognized the judge's signature, and proceeded with the search. Lt. Snyder wasn't shown any affidavit in support of probable cause. The dog was sent into the van, and it alerted to the black bag in the center console area. Officers found that the bag contained twenty-four bags of methamphetamine, individually sealed just like the ones that had been seized near Defiance, Ohio. A field test indicated that the substance was methamphetamine, and Mr. Washburn was formally arrested.

Mr. Washburn attacks the search warrant on a variety of bases. The information on which the warrant was based, he says, was not under oath; the judge that issued the warrant was not neutral and detached; probable cause did not support the warrant; the credibility of informant Morgan was not sufficiently supported; the basis of reported knowledge was not identified; and the warrant was based on false and reckless statements. The government contends that the suppression motion can be denied without addressing those arguments, and rather than disrupt the court whose judge

issued the warrant, the government asked that the hearing be bifurcated. Without objection from Mr. Washburn, the court granted that motion.

Mr. Washburn's remaining arguments are that the stop was far longer than the brief investigatory stop permitted by Terry v. Ohio, 392 U.S. 1 (1968), that any warrantless search of the van was improper because Mr. Washburn had been separated from the van, and that the police improperly arrested Mr. Washburn solely to ascertain his identity.

An officer may arrest a person if she has probable cause to believe that the person committed a crime; an officer without probable cause, but with a reasonable suspicion supported by articulable facts—an objective manifestation that the person stopped is, or is about to be, engaged in criminal activity—may make an investigatory stop limited in scope and executed through the least restrictive means reasonable. United States v. Morrison, 254 F.3d 679 (7th Cir. 2001). To be reasonable, the stop must be limited in duration. In United States v. Place, 462 U.S. 696 (1983), the Supreme Court held that an investigatory stop was unreasonable when officers held the person's luggage for an hour and a half to allow a drug-sniffing dog to arrive and check the luggage for the scent of controlled substances.

Mr. Washburn says his experience on November 6 was worse than the circumstances of United States v. Place. His van was detained from about 7:00 p.m., when police ordered him to the ground, until minutes after 9:00, when he

was arrested. Most of that time, Mr. Washburn says, was spent waiting for the drug dog's arrival: Mr. Washburn presented police records indicating that the canine unit did not set out for the Weston Plaza until 8:18 p.m. The government countered with evidence that the task force agents on the scene had cell phones and knew the cell number of the dog handler; a cell phone call would not appear on the police records. The government's evidence is unpersuasive in light of the nature of the contact reflected on the records introduced into evidence: it appears more likely than not that the canine unit didn't arrive on the scene for the first time until 8:20 or so, and that Lt. Snyder's recollection that the dog arrived earlier is mistaken.

This was not, however, an investigatory stop by the time the canine unit arrived. Within minutes of approaching Mr. Washburn, the officers had probable cause to believe Mr. Washburn's van contained methamphetamine. Within a few minutes of stopping Mr. Washburn—specifically, by the time Lt. Snyder asked Mr. Washburn to consent to a search of the van, the officers knew the following:

- After having been informed that a methamphetamine transaction was to occur with Jessie Tejerina on the morning of November 6 at Thomas Wright's home, police watched a meeting take place between those two men.
- Police then followed a collection of cars, including Mr. Tejerina and Mr.Wright, from Elkhart into Ohio, toward Defiance, where they stopped the caravan and in one of the cars found ten one-pound, shrink wrapped packages containing a substance that field-tested as methamphetamine.
* David Morgan, one of the people in the intercepted caravan, admitted his involvement in the drug offense. In a statement slathered with penal consequence to himself, Mr. Morgan said he had gotten the methamphetamine from Shawn Washburn who lives on County Road 6 in Elkhart, as he had done on other occasions. He also said that he got the ten pounds of methamphetamine the police had found from a black bag on the console of Mr. Washburn's van, and that the

bag contained sixteen more one-pound packages of methamphetamine.

* Thomas Wright, interviewed separately, provided partial corroboration of Mr. Morgan's information by identifying Mr. Washburn as the source of the seized methamphetamine.

* Mr. Morgan placed monitored phone calls after the Defiance police authorities accepted his offer of assistance. Mr. Morgan reported that those phone calls were made to Mr. Washburn. Although the police did not confirm that the number to which the calls were placed was assigned to Mr. Washburn, they reviewed the recordings of the calls. In the first call, police heard the person reported to be Mr. Washburn reply affirmatively when Mr. Morgan said, "they had some extra cash and shit, they was talking about wanting to pick up some more.... So, ah, if you want we just do them, them two that, that we had set aside earlier. ... Plus, ah, ten more. ... And we should be ready to rock and roll when we get there."

* In the second monitored call, which was placed at 6:35 p.m., police heard the person reported to be Mr. Washburn tell Mr. Morgan (who claimed to be heading back to Elkhart) to meet him at the Weston Plaza in twenty minutes. As a result of that call, Elkhart area officers staked out the Weston Plaza parking lot.

* Mr. Morgan had told police that Mr. Washburn had been driving a white Chevrolet conversion van with graphics on the outside, a woodgrain interior, and a black bag on the console containing individually wrapped one-pound quantities of methamphetamine.

* A few minutes before 7:00 p.m., a white Chevrolet conversion van with graphics on the outside entered the parking lot of the Weston Plaza.

* The white van circled the Weston Plaza, consistent with an unmet expectation to see a particular vehicle in the lot.

* The van was parked, an a male got out of the vehicle.

* One of the officers conducted a check on the van's plate

and found that it was registered to Jo Ann and Shawn Washburn on County Road 6.

* When the police officers approached the man returning to the van, the man identified himself as Shawn Washburn.

• When Lt. Snyder reached the van, he saw a woodgrain interior and a black bag on the console.

Probable cause exists when, based on the totality of the circumstances, there is enough information to induce a reasonably prudent person to believe that a search will uncover evidence of a crime. United States v. Peck, 317 F.3d 754, 755 (7th Cir, 2003); United States v. Roth, 201 F.3d 888, 892 (7th Cir. 2000). Whether probable cause exists depends on each specific set of facts, Ornelas v. United States, 517 U.S. 690, 696 (1996), but the analysis in United States v. Johnson, 289 F.3d 1034 (7th Cir. 2002), is instructive.

Johnson moved to suppress evidence seized during a search based upon a warrant, contending that the warrant was not supported by probable cause. The warrant had been issued largely on the strength of a confidential informant's report. The court of appeals said the lack of detail and specificity in the informant's report made the case a close one, but found that the finding of probable cause was adequately supported because (1) the informant claimed first-hand observations of illegal activity, (2) the informant's report constituted statements against penal interest, (3) an investigating officer was able to corroborate some of the information by confirming that a vehicle seen outside the place to be searched was registered to Johnson, and (4) the informant personally appeared and testified before the magistrate who issued the warrant.

Three of those four factors are present here. Mr. Morgan claimed first-hand observation of the individually wrapped packages in the console of the van. Mr. Morgan's statements to police, though doubtlessly made in the hopes of currying favor with authorities, were against his penal interest. Police

confirmed the white conversion van's registration to Mr. Washburn and his wife.

No informant testified personally before a magistrate in support of a. search warrant, but a flood of other facts provide the sort of specificity and detail the Johnson court found wanting. Mr. Morgan was corroborated, not only by the registration, but by second self-incriminating informant interviewed separately and by the very appearance of Mr. Washburn's van at the precise time and place of the rendevous, (a white conversion van with graphics on the outside, a woodgrain interior, and a black bag on the console), by the van's behavior in circling the hotel upon arrival, and by the driver's self-identification as Shawn Washburn. Indeed, even the corroboration through the van's registration was stronger than in Johnson: not only was the van registered to Shawn Washburn, it was registered to the Shawn Washburn on County Road 6, where Mr. Morgan said he had gotten the methamphetamine. Police corroboration of important parts of an informant's report are important in deciding whether probable cause exists, United States v. Jones, 208 F.3d 603, 608 (7th Cir. 2000), and the police had corroborated nearly every aspect of Mr. Morgan's story that could be confirmed without actually looking into the van. Even without the use of the drug dog, the police had probable cause to believe the van—and more specifically, the bag on the console in the van—contained methamphetamine packaged for distribution.

When (as here) police have probable cause to believe a motor vehicle contains contraband or evidence of criminal activity, they do not need a warrant to search the vehicle; the vehicle's mobility and the reduced expectation of privacy in a motor vehicle breathe reasonableness into a warrantless search. See United States v. Ross, 456 U.S. 798 (1982); Chambers v. Maroney, 399 U.S. 42 (1970). No warrant is needed to search a container located in the vehicle, if (as here) police have probable cause to believe the container has

contraband within it. See California v. Acevedo, 500 U.S. 565, 580 (1991) United States v. Ross, 456 U.S. at 823.

The police needed neither a drug dog nor a warrant to search Mr. Washburn's van.. That they sought the use of both does not vitiate the permissibility of the warrantless search, even if the dog's arrival took an unseemly time, or even if the officer who applied for the warrant failed to swear to the information provided to the issuing judge. The court need not decide whether the warrant was deficient.

Similarly, because the police had probable cause to search the van and the bag on its console, United States v. Place, 462 U.S. 696, does not affect the permissibility of the search; this was not an investigatory stop that required a brief detention. This was a search within the meaning of the Fourth Amendment.

Because the search was reasonable within the meaning of the Fourth Amendment, the court DENIES the defendant's motion to suppress.

SO ORDERED.
ENTERED: May 20, 2003.

/s

Robert L. Miller, Jr., Judge
United States District Court

cc: D. Schmidt
L. Mellinger, F. Zirkle

APPENDIX B

MEMORANDUM AND ORDER

OF THE UNITED STATES DISTRICT

COURT FOR THE NORTHERN DISTRICT

OF INDIANA, SOUTH BEND DIVISION,

ROBERT L. MILLER, JR., JUDGE

ENTERED ON AUGUST 1, 2003

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND .DIVISION

UNITED STATES OF AMERICA

vs. CAUSE NUMBER
3:03CR0017RM

SHAWN R. WASHBURN

MEMORANDUM AND ORDER

Shawn Washburn asks the court to reconsider its denial of his motion to suppress evidence seized in a search conducted on November 6, 2002. The government opposes reconsideration. For the reasons stated below, the court denies Mr. Washburn's motion to reconsider. The court will not revisit the facts of this case, which were extensively discussed in the May 20, 2003 ruling.

Mr. Washburn offers five reasons why the court should reconsider its denial of his suppression motion. First, he says the warrant authorizing the search in Ohio was illegal, making the evidence turned up in the search of his car forbidden fruit of the poisonous tree. Second, and relatedly, Mr. Washburn complains that the government did not turn over the search warrant authorizing the Ohio search, in violation of Brady v. Maryland, 373 U.S. 83 (1963). Third, he contends that the automobile exception should not apply to this case because: 1) he was not in the car at the time of the seizure; 2) the car was parked in the lot of a place that is regularly used for residential purposes; 3) the car was not mobile; and 4) no exigent circumstances existed justified the search. As his final two reasons for reconsideration, Mr. Washburn argues that there

was no probable cause for the search and that suppression is the only means to effectively deter the kind of police misconduct that he says infected this case.

The government says that Mr Washburn has no standing to challenge the Ohio search because he has no ownership interest in the cars that were searched. As for the alleged discovery violations, the government simply answers, "the government complied with the court's order on Discovery and all of the government's discovery obligations." Response at 1. The government defends the application of the automobile exception by offering a point by point refutation of Mr. Washburn's critique. Response at 2-4.

The court must begin with a knotty jurisdictional issue that the parties do not address: whether jurisdiction over the central issue of this case has been transferred to the court of appeals. See generally Cook v. Winfrey, 141 F.3d 322, 325 (7th Cir. 1998) (explaining that it is the duty of a federal court to "assure itself that it possesses jurisdiction") . The jurisdictional issue flows from Mr. Washburn's decision to try to proceed in two venues, namely, this court and the court of appeals. Mr. Washburn has filed a notice of appeal, an act that normally "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount, Co., 459 U.S. 56, 58 (1982). The appeal and the motion addressed to this court cover the same subject, the denial of the motion to suppress evidence. Though divestiture is the norm, it is not an absolute rule. Jurisdiction is not

transferred if the subject of the proposed appeal is not appealable, United States v. Bastanipour, 697 F.2d 170, 173 (7th Cir. 1982), or if the appeal is otherwise seriously defective, see, e.g., Mondrow v. Fountain House, 867 F.2d 798, 800 (3rd Cir. 1989) (finding that a premature notice of appeal does not strip the district court of jurisdiction).

This court has not lost jurisdiction over this case. United States v. Bastanipour, 697 F.2d at 173. The entry of judgment in a criminal case does not occur until the court has completed the sentencing process, Howard v. United States, 135 F.3d 506, 509 (7th Cir. 1998), which it has not done here. Because the court has not entered a final judgment, Mr. Washburn's appeal of this court's denial of his motion to suppress is interlocutory. A criminal defendant may not take an (interlocutory) appeal from an order denying a motion to suppress evidence. United States v. Davis, 1 F.3d 606, 607 (7th Cir. 1992); United States v. Calandra, 707 F.2d 225, 227 (7th Cir. 1983); United States v. Dorfman, 690 F.2d 1217, 1222 (7th Cir. 1982). In conjunction with Bastanipour, then, Davis, Calandra, and Dorfman suffice to ensure that this court retains jurisdiction over Mr. Washburn's "Motion to Correct Errors."[1]

Further, even if jurisdiction shifted to the court of appeals, this court would retain jurisdiction to deny, if not grant, Mr. Washburn's appeal under Kusay v.

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[1] Because no such motion exists under the federal rules, the court interprets his motion as an invocation of the court's inherent power to review interlocutory orders. Marconi Wireless Tel. Co. v. United States, 320 U.S. 1, 47-48 (1943). See also U.S. v. Rezaq, 899 F.Supp 697, 701 (D.D.C. 1995) (applying Marconi's proposition to a criminal case).

United States, 62 F.3d 192, 195 (7th Cir. 1995). According to Kusay, a general principle allows district courts to deny, but not grant, "a post judgment motion while an appeal is pending." 62 F.3d at 195. There is no judgment here, but the underlying principle is the same: the court has jurisdiction to deny this motion because in doing so it does not undercut the appellate court's jurisdiction—the status quo remains. See also Chicago Downs Ass'n, Inc. v. Chase, 944 F.2d 366, 370 (7th Cir. 1991) (reminding that courts have the power to rule on Fed. R. Civ. P. 60(b) motions during the pendency of an appeal). So, one way (Bastinpour plus Davis, Calandra, and Dorfman) or another (Kusay) this court has jurisdiction to address Mr. Washburn's motion.

Reconsideration is unnecessary. A court will reconsider a motion if it has patently misunderstood a party, has made a decision outside of the adversarial issues presented by the parties, or has made an error not of reasoning but of apprehension. United States v. Thompson, 1992 WL 51675 at * 1 (N.D. Ill. March 5, 1992). Mr. Washburn does not argue that the court has done any of these things; instead, he reargues his motion to suppress. Because a motion to reconsider is not the proper place for such arguments, Kennedy v. Commonwealth Edison, Co., 252 F. Supp 2d 737, 739 (N.D. Ill 2003) (noting that a motion to reconsider is not the proper vehicle for raising matters that could have been raised in prior arguments or rehashing rejected claims), the court finds them, by definition, unpersuasive.

For the forgoing reasons, the court DENIES Mr. Washburn's motion to reconsider [Docket Nos. 37 and 39], and the original ruling on the motion to suppress stands.

SO ORDERED.

ENTERED: AUGUST 1, 2003

__/S_____

Robert L. Miller, Jr., Chief Judge

United States District Court

cc: D. Schmid
L. Mellinger, F. Zirkle
Court of Appeals

APPENDIX C

JUDGMENT AND SENTENCING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION, ROBERT L. MILLER, JR., JUDGE ENTERED ON AUGUST 27, 2003

AO 245B (Rev. 3/05) Judgment in a Criminal Case, Sheet 1

United States District Court
Northern District of Indiana

United States of America **JUDGMENT IN A CRIMINAL CASE**

v.

SHAWN R. WASHBURN Case No: 3:03CR00017(01)RM
Lee F. Mellinger/Frederick A. Zirkle, Defendant's Attorneys

THE DEFENDANT
X pleaded guilty to count 1

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section: 21:841(a)(1)

Nature of Offense: Possession with Intent to Distribute in Excess of 50 Grams of Methamphetamine

Date Offense Concluded: 11-06-22

Count Number(s): 1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notifiy the United States attorney for this district within 30 days of any

change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment: August 22, 2003
/s

_____
Signature of Judicial Officer

Robert L. Miller, Jr., Chief Judge

_____
Name and Title of Judicial Officer
August 25, 2003

_____
Date

Page 2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of one-hundred seventy-nine (179) months.

X The defendant is remanded to the custody of the United States Marshal.

RETURN

...

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
The defendant shall not commit another federal, state or local crime.
The defendant shall not illegally possess a controlled substance.
For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) – 15) ...

Page 4

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall participate in a substance abuse treatment program, which may include urine testing, under a co-payment plan under which the defendant will be held responsible for 3 percent per $100 of his net wages. If the defendant is unemployed or receiving public assistance, the defendant shall be held responsible for a co-payment of $10 per month. Payments shall be made on a per visit basis, and shall not exceed the contract price.

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CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth Sheet 5, Part B.

Assessment: $100
Fine: $0
Restitution: $0

X The defendant shall make special assessment payment (s) payable to Clerk, U.S. District Court, 102 Robert A. Grant Federal Building, 204 S. Main St., South Bend, IN 46601.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless

specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. Sec. 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee:	*Total Amount of Loss:	Amount of Restitution Ordered:	Priority Order or Percentage of Payment:
Totals:	$0		

APPENDIX D

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT, DATED SEPTEMBER 9, 2004 IN U.S. v. SHAWN R.WASHBURN, 383 F.3d 638 (7th Cir. (Ind.) 2004)

UNITED STATES of America,
Plaintiff–Appellee,
v.
Shawn R. WASHBURN, Defendant–Appellant.
No. 03–3325.
United States Court of Appeals,
Seventh Circuit.
Argued March 29, 2004.
Decided Sept. 9, 2004.
Background: Defendant was convicted on conditional guilty plea in the United States District Court for the Northern District of Indiana, Robert L. Miller, Jr., Chief Judge, of narcotics trafficking, and he appealed District Court's denial of his motion to suppress.
Holdings: The Court of Appeals, Ilana Diamond Rovner, Circuit Judge, held that:
(1) automobile exception to search warrant requirement was not rendered inapplicable by fact that defendant was detained while outside vehicle;
(2) police had probable cause to search defendant's vehicle even though codefendant/informant who had described vehicle had become informant in hopes of receiving consideration;
(3) allegedly overlong investigatory detention of defendant did not negate probable cause to search his vehicle; and
(4) defendant had no subjective expectation of privacy in bag found in trunk of

codefendant's automobile during warranted search.
Affirmed.
1. Searches and Seizures O62
Under automobile exception to search warrant requirement, warrantless search of vehicle may be conducted so long as there is probable cause to believe it contains contraband or evidence of illegal activity. U.S.C.A. Const.Amend. 4.
2. Searches and Seizures O60.1
Lesser expectation of privacy in a vehicle, as well as vehicle's mobility, justifies automobile exception to search warrant requirement. U.S.C.A. Const.Amend. 4.
3. Controlled Substances O114
Fact that vehicle belonging to narcotics trafficking suspect, who was detained while approaching vehicle, was not immediately accessible by suspect after detention did not render inapplicable automobile exception to search warrant requirement; vehicle was inherently mobile, and suspect had lessened expectation of privacy in it. U.S.C.A. Const.Amend. 4.
4. Searches and Seizures O26
Hotel guest does not enjoy heightened expectation of privacy in vehicle parked in hotel's parking lot. U.S.C.A. Const. Amend. 4.
5. Controlled Substances O148(3)
Police had probable cause for warrant to search suspect's vehicle for evidence of narcotics activity even though codefendant/ informant who had described vehicle

and set up controlled buy with suspect/ driver had become informant in hopes of receiving consideration; informant had implicated himself in narcotics trafficking thus providing indicia of reliability, officers were able to test reliability of informant's information by observing events predicted by him including description of vehicle and presence of black bag in specific location inside vehicle, second codefendant also named suspect, and drug dog alerted to vehicle after suspect was detained.
U.S.C.A. Const.Amend. 4.
639 U.S. v. WASHBURN
Cite as 383 F.3d 638 (7th Cir. 2004)
6. Criminal Law O1139, 1158(2)
Court of Appeals reviews de novo federal district court's determination of probable cause for search, and reviews underlying findings of fact for clear error.
U.S.C.A. Const.Amend. 4.
7. Controlled Substances O148(1)
Allegedly overlong investigatory detention of narcotics trafficking suspect prior to his formal arrest did not negate probable cause to search suspect's vehicle based on informant's information; no evidence was gathered as result of detention as opposed to that seized from vehicle search, which was justified under automobile exception, and officers had probable cause to believe suspect was involved in earlier drug transaction based on codefendant's confession and officers' corroboration of statements accompanying confession.

U.S.C.A. Const.Amend. 4.
8. Controlled Substances O155
Narcotics trafficking defendant had no subjective expectation of privacy in bag found in trunk of codefendant's automobile during warranted search of automobile that resulted from confidential informant's tip; police learned defendant's identity from codefendant's confession, in which codefendant named defendant as drug source, which occurred only after search that turned up bag, and defendant's tendering of bag to codefendant for delivery gave no hint of retention of any control over it. U.S.C.A. Const.Amend. 4.
9. Sentencing and Punishment O870
Police officers' alleged falsification of time when they confirmed identity of federal narcotics trafficking suspect's vehicle's license plate, and of time when drug dog arrived at vehicle, did not require trial court to sua sponte depart downward from Sentencing Guidelines on grounds of police misconduct. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).
Donald J. Schmid (argued), Office of the United States Attorney, South Bend, IN, for Plaintiff–Appellee.
Frederick A. Zirkle (argued), Crown Point, IN, for Defendant–Appellant.
Before CUDAHY, ROVNER, and DIANE P. WOOD, Circuit Judges.
ILANA DIAMOND ROVNER, Circuit Judge.

Shawn R. Washburn pleaded guilty to one count of possessing with intent to distribute more than 50 grams of methamphetamine, 21 U.S.C. § 841(a)(1), pursuant to a conditional plea agreement. Under the plea agreement, Washburn reserved his right to challenge on appeal the district court's denial of his motion to suppress evidence found during a search of his vehicle on November 6, 2002. We uphold the district court's denial of his motion.

The search of Washburn's vehicle occurred after police officers from Indiana and Ohio gathered information about a methamphetamine distribution ring from two different individuals who had agreed to assist the officers. One of the cooperating informants arranged a drug transaction for that day involving the delivery of ten pounds of methamphetamine from Elkhart, Indiana, to Defiance, Ohio. Officers knew from the informant that a Thomas Wright and several others planned to drive the methamphetamine to Defiance in a caravan of either two or three automobiles and procured a search warrant in anticipation of stopping the vehicles. After stopping Wright and the others before they reached Defiance, the officers found in the trunk of one of the cars a suitcase with

ten, one-pound vacuum-sealed bags containing a substance that field-tested positive for methamphetamine. The police then took the individuals into custody.

Washburn's name surfaced for the first
time during two separate interviews that
the officers conducted with Wright and
David Morgan, another member of the caravan.
Both Wright and Morgan identified
Washburn as the supplier of the methamphetamine.
Morgan also admitted during
his interview to his role in the drug transaction.
He explained to the officers that
he received the ten pounds of methamphetamine
from Washburn, who, according
to Morgan, had carried the drugs in a
black bag that he kept between the seats
of his car. Morgan described Washburn's
car as a very nice, white Chevrolet "conversion"
van with wood trim on the interior
and graphics on the exterior.
Morgan then agreed to cooperate with
the officers, and set up a drug transaction
directly with Washburn later that evening.
While being tape-recorded by the officers,
Morgan called Washburn. During the
conversation Morgan confirmed the success
of that morning's ten-pound delivery
to Ohio and arranged to pick up twelve
more pounds of methamphetamine, ten for
another delivery and two pounds, it seems,
for himself. During a second tape-recorded
conversation, Morgan and Washburn
decided to meet at 7:00 p.m. that night in
the parking lot of the Weston Plaza hotel
in Elkhart.
That night at 7:00 p.m., officers observed
a white conversion van with graphics
on its exterior enter the parking lot of

the Weston Plaza hotel, circle the building once, and stop in front of the entrance. The driver emerged from the van and went into the hotel. As he returned to the van several minutes later, two or three officers surrounded him with weapons drawn and ordered him to the ground. Washburn identified himself to the officers, and the officers obtained his car keys. Aided by flashlights and the bright lights of the parking lot, the officers were able to see, when peering into the van, both the wood trim in the interior and a black bag between two seats. The officers then asked Washburn if they could search the van, but he politely declined. He then agreed to wait in a police car.

Either just before the stop of Washburn or shortly thereafter, the police officers at the scene placed two calls. The first call confirmed that the license plate of the van was registered to Washburn. The second call requested the assistance of a canine unit to conduct a drug sniff of the van. The canine unit arrived by 8:25 p.m. at the latest. The dog alerted its handler to the presence of drugs near the seam where the passenger double doors and front passenger door open.

In response to the police dog's positive signal, one of the officers called a prosecutor and requested a search warrant for the van. A state judge in Elkhart signed the warrant at approximately 8:45 p.m. During the subsequent search, the officers found

between two seats a black bag with twenty-four, vacuum-sealed packets each weighing one pound, like those seized earlier that day. The contents field-tested positive for methamphetamine. After this discovery, the police formally placed Washburn under arrest two hours after the initial stop.

Washburn was charged in federal court and moved to suppress the evidence found that night, arguing first that the search warrant was defective because (1) there was no probable cause to support it, (2) the warrant did not contain an "oath or affirmation," and (3) the state judge who authorized it was not neutral and detached. He also contended that the time that he was held before the search exceeded the

length of time permissible for a brief investigatory stop. After holding a hearing on Washburn's motion to suppress, the district court concluded that the police officers had probable cause to search the van, and so, under the "automobile exception," the search was valid whether the officers had a warrant or not. The court reasoned that Morgan was sufficiently reliable because he claimed first-hand knowledge of the illegal activity, and his statements were against his penal interest and corroborated by subsequent events. Because the officers had probable cause, the court concluded, they could detain Washburn beyond

the length of time permitted for an investigatory stop. Having based its decision on the automobile exception, the court did not decide whether the warrant was deficient. After filing a self-described "Amended Motion to Correct Error," which the district court denied, Washburn pleaded guilty.

On appeal, Washburn first argues that the district court erred in applying the automobile exception to validate the search of his van because his van had lost its mobility at the time of the stop. Washburn points out that he was not inside the vehicle when the officers approached him and that after the initial stop he did not even have access to his car keys. Washburn thus reasons that the officers had enough time to procure a warrant, and did in fact obtain one, so the automobile exception is not available as a basis for upholding the search.

[1, 2] The Supreme Court in *Carroll v. United States,* 267 U.S. 132, 153–56, 45 S.Ct. 280, 69 L.Ed. 543 (1925), recognized an automobile exception, allowing a warrantless search of a vehicle to be conducted so long as there is probable cause to believe it contains contraband or evidence of illegal activity. *Maryland v. Dyson,* 527 U.S. 465, 466–67, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (per curiam); *Pennsylvania v. Labron,* 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) (per curiam); *California v. Carney,* 471 U.S.

386, 390, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985); *United States v. Huebner,* 356 F.3d 807, 813 n. 2 (7th Cir.2004); *United States v. Ledford,* 218 F.3d 684, 688 (7th Cir.2000). The original premise for the automobile exception was that a vehicle's "ready mobility" made an "immediate intrusion" necessary to prevent the destruction of evidence. *Carney,* 471 U.S. at 390–92, 105 S.Ct. 2066 (internal citations and quotations omitted); *see Labron,* 518 U.S. at 940, 116 S.Ct. 2485. In *Carney,* however, the Supreme Court clarified that a second reason justified the exception even where an automobile is "not immediately mobile"—the lesser expectation of privacy in a vehicle. *Carney,* 471 U.S. at 392, 105 S.Ct. 2066; *see Labron,* 518 U.S. at 940, 116 S.Ct. 2485; *United States v. Matthews,* 32 F.3d 294, 299 (7th Cir.1994).

[3] With these two justifications in mind, Washburn's argument that his lack of accessibility to the van made inapplicable the automobile exception is misconceived. So long as Washburn's van was inherently, even if not immediately, mobile, the application of the automobile exception was still valid based on the diminished expectation of privacy in one's vehicle. *See Matthews,* 32 F.3d at 299; *United States v. Gallman,* 907 F.2d 639, 641 (7th Cir.1990); *United States v. Brookins,* 345 F.3d 231, 237 n. 7 (4th Cir. 2003); *United States v. Mercado,* 307 F.3d 1226, 1228–30 (10th Cir.2002). And

the van qualified as readily mobile; Washburn's lack of access to the vehicle did not defeat its inherently mobile status. *See Gallman,* 907 F.2d at 641.

[4] To the extent that Washburn challenges the second justification for applying the automobile exception—asserting that

he legitimately harbored a heightened expectation of privacy because his van was parked in a lot used by temporary residents of the hotel—his argument fails. We have always rejected the notion that a hotel occupant enjoys the same expectation of privacy in his car in the parking lot of the hotel as he does in the room itself; the hotel parking lot is "readily accessible to the public and not generally thought of as a place normally used as a residence." *United States v. Foxworth,* 8 F.3d 540, 545 (7th Cir.1993); *United States v. Markling,* 7 F.3d 1309, 1319 (7th Cir.1993); *see also United States v. Diaz,* 25 F.3d 392, 396–97 (6th Cir.1994); *United States v. Ludwig,* 10 F.3d 1523, 1526 (10th Cir.1993). Neither Washburn's inaccessibility to his van nor its location in the hotel parking lot invalidates the district court's application of the automobile exception.

[5] Washburn also argues that the district court should have concluded that Morgan's statements alone did not provide the officers with probable cause to search his van. Pointing out that Morgan cooperated with police in hopes of receiving some

type of consideration for his help, Washburn insists that Morgan's confession was not really against his penal interest, and so, in his view, the indicia of reliability that normally accompanies such statements did not attach. He also questions the officers' reliance on Morgan because Morgan was a first-time informant whose information had never been tested for veracity.

[6] We review a district court's determination of probable cause de novo and its findings of fact for clear error. *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Probable cause to search exists where there is a fair probability that an officer will find contraband or evidence of illegal activity at a specified location based on the totality of the circumstances. *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *United States v. McClinton,* 135 F.3d 1178, 1183 (7th Cir.1998). Probable cause is a "fluid concept," *Ornelas,* 517 U.S. at 696, 116 S.Ct. 1657, and when an informant is involved, it may turn upon the informant's reliability, basis for knowledge, and degree of detail, as well as the ability of the police to corroborate the information, *United States v. Johnson,* 289 F.3d 1034, 1038–39 (7th Cir.2002).

In this case, the officers had probable cause to search the van, at the latest, within moments of placing Washburn in the back of patrol car. Morgan's inculpatory statements along with both Wright's

corroboration of Washburn's identity and the officers' later corroboration of Morgan's information established probable cause despite Morgan's possible motive to seek a deal with prosecutors and his status as a first-time informant. Regardless whether Morgan ultimately provided officers with information about Washburn to benefit himself, he still implicated himself in a drug-trafficking crime with his confession, so his possible motive for confessing would not significantly lessen his statements' indicia of reliability. *See Molina ex rel. Molina v. Cooper,* 325 F.3d 963, 970–71 (7th Cir.2003). And officers were then able to test the reliability of Morgan's information as they watched the events that he predicted unfold. *See McClinton,* 135 F.3d at 1184. In keeping with Morgan's arrangements on the telephone, a white Chevrolet conversion van with graphics on its exterior arrived at the Weston Plaza hotel at 7:00 p.m., driven by a man who identified himself as Washburn. By peering into the van, police were able to see interior wood trim and a black bag between two seats, as Morgan had described. This proof of Morgan's "inside information" confirmed his reliability. *See Alabama v. White,* 496 U.S. 325, 332, 110

S.Ct. 2412, 110 L.Ed.2d 301 (1990); *McClinton,* 135 F.3d at 1184. Furthermore, Morgan was not the sole source of

the officers' information about Washburn; Wright had also told the officers in a separate interview that Washburn supplied the ten pounds of methamphetamine seized in Ohio. Taken together, Morgan's and Wright's statements and the officers' ability to independently corroborate the information provided them with probable cause to search Washburn's van. And if all this were not enough, we have held that a positive alert by a trained drug dog gives rise to probable cause to search a vehicle. *United States v. Limares,* 269 F.3d 794, 798 (7th Cir.2001); *United States v. Thomas,* 87 F.3d 909, 912 (7th Cir.1996).

[7] Washburn additionally asserts that the district court should have determined that his two-hour detention before his formal arrest exceeded the reasonable length of time for an investigatory stop. But he fails to develop the argument, so it is waived. *See Martin v. Shawano–Gresham Sch. Dist.,* 295 F.3d 701, 706 n. 4 (7th Cir.2002). In any event, even if Washburn is correct that his detention was unreasonably long for an investigatory stop, we do not see how this point helps his case. Washburn identifies no evidence that was gathered as a result of his detention as opposed to that seized from the valid search of his van. And the officers were permitted to hold Washburn beyond the reasonable length of time for an investigatory search because they had more than reasonable suspicion that Washburn was

engaged in criminal activity; they had probable cause to believe he was involved in the earlier drug transaction based on Morgan's confession and both Wright's and the officers' corroborations of those statements. *See United States v. Brown,* 366 F.3d 456, 458 (7th Cir.2004).

[8] Washburn next turns to the search warrant for the caravan of cars heading to Defiance, arguing that it was too vague and overbroad and that, consequently, evidence from the subsequent search of his van should have been suppressed as "fruit of the poisonous tree." But Washburn never established that the challenged search infringed any interest of his that "the Fourth Amendment was designed to protect." *Rakas v. Illinois,* 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). In trying to establish that the search did directly violate his Fourth Amendment rights, Washburn argues that he exhibited a subjective privacy interest in the suitcase containing the methamphetamine found in the trunk of one of the cars and that the officers knew the suitcase belonged to him. But Washburn's assertion about the officers' knowledge mischaracterizes their testimony at the suppression hearing. The officers stated that, to their knowledge, Washburn had "provided" Wright, Morgan, and the others with the suitcase—a fact the officers could have learned only during the post-search interview with Morgan when Washburn's name first surfaced.

See United States v. Rem, 984 F.2d 806, 811 (7th Cir.1993) (when deciding whether defendant abandoned luggage, "the flow of information considered stops at the moment the police officer opened the suitcase"). It is frivolous to argue that under these circumstances Washburn had exhibited a subjective interest of privacy in the suitcase. *See United States v. Pitts,* 322 F.3d 449, 456 (7th Cir.2002). And Washburn's tendering of the suitcase to the others for delivery to another city in a different state does not even hint that he retained any control over it or had taken any precautions to maintain his supposed privacy interest in it. *See United States v. Elmore,* 304 F.3d 557, 562 (6th Cir.2002) (whether defendant took precautions to maintain privacy is relevant in determining
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existence of reasonable expectation of privacy); *see also California v. Greenwood,* 486 U.S. 35, 39–41, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) (no expectation of privacy in trash left for third-party garbage collector).

[9] Finally, as counsel for Washburn clarified at oral argument, he proposes affirming Washburn's conviction but granting a downward departure to no prison time as a remedy for what he sees as police misconduct. The alleged police misconduct consisted of the officers' possibly faulty estimation of the time at which they confirmed that the license plate of the van

was registered to Washburn and at which the canine unit arrived at the Weston Plaza hotel. But even assuming that Washburn could establish that the officers' testimony was intentionally false, which would require overcoming the high amount of deference accorded to a district court's credibility determination, *United States v. Merritt,* 361 F.3d 1005, 1009–10 (7th Cir. 2004), we have serious doubts about whether police misconduct that did not have any effect on the nature of the offense or the individual offender would ever be a permissible ground for departure. *See Koon v. United States,* 518 U.S. 81, 96, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) (district court should consider the objectives of the Guidelines when deciding to depart downward on an unlisted ground); *United States v. Guzman,* 236 F.3d 830, 834 (7th Cir.2001). And, in any event, we have never found error in the failure of a district court to depart downward sua sponte. *See United States v. Olano,* 507 U.S. 725, 733–34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Cruz–Velasco,* 224 F.3d 654, 663–64 (7th Cir.2000).

Washburn has not presented a sufficient argument for overturning the district court's denial of his motion to suppress, so we AFFIRM its judgment.